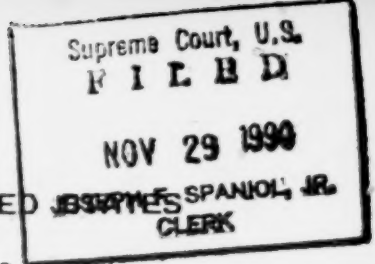


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90-878



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

=====

BOBBY JOE JOHNSON
PETITIONER,

VS.

STATE OF ALABAMA
RESPONDENT.

=====

APPEAL FROM:

SUPREME COURT OF ALABAMA
CASE NO.: 89-1378

ALABAMA COURT OF CRIMINAL APPEALS
CASE NO. 2 DIV. 746

CIRCUIT COURT OF WILCOX COUNTY, ALABAMA
CASE NO.: CC 88-63

=====

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

=====

LARRY C. MOORER
Attorney for Petitioner
First National Bank Building
107 St. Francis St.
Suite 2408
Mobile, AL 36602
(205) 432-0002



QUESTION PRESENTED FOR REVIEW

Whether the Trial Court committed reversible error in denying Petitioner's motion to dismiss the jury on the grounds that Counsel for the State discriminantly used her peremptory challenges to strike Blacks from the jury?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

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BOBBY JOE JOHNSON,
PETITIONER,

VS.

STATE OF ALABAMA
RESPONDENT.

=====

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

=====

The Petitioner, Bobby Joe Johnson,
respectfully prays that a writ of
certiorari issue to review the judgment of
the Supreme Court of Alabama entered on
August 31, 1990.

OPINIONS BELOW

The Alabama Supreme Court entered its
decision on August 31, 1990 denying
Petitioner's petition for a writ of

certiorari to issue to review the Alabama Court of Criminal Appeals' decision which affirmed the denial of Petitioner's motion to dismiss the jury on Petitioner's stated grounds that Counsel for the State discriminantly used her peremptory challenges to strike Blacks from the jury venire. A copy of the decision is printed in Appendix A.

JURISDICTION

On August 31, 1990, the Supreme Court of Alabama, entered its decision denying Petitioner's petition for a writ of certiorari to issue to the Alabama Court of Criminal Appeals, which affirmed the denial of Petitioner's motion to dismiss the jury on Petitioner's stated grounds that Counsel for the State discriminantly used her peremptory challenges to strike Blacks from the jury venire. (Appendix A). The jurisdiction of this Court is invoked

under Title 28, United States Code,
Section 1254(1). No other petitioner is
involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment
VI, Petitioner's right to a fair and
impartial trial before his peers,
Amendment XIV, Petitioner's right to the
equal protection of the law and the right
to due process.

STATEMENT OF THE CASE

Petitioner, Bobby Joe Johnson, was
tried in the District Court of Wilcox
County, Alabama on the charge of having
made an Harassing Communication. He was
found guilty of the charge. Petitioner
appealed to the Circuit Court of Wilcox
County, Alabama. On August 23, 1989 a
jury was selected. After deliberation,
the jury returned with a finding of guilty
to the charge. Petitioner was sentenced

to sixty (60) days in the Wilcox County Jail, ten (10) days of which he was ordered to serve, the remaining fifty (50) days were suspended and Petitioner was placed on a one (1) year probation with a special condition that he not threaten, harass or assault any member of the female gender. On September 8, 1989, Petitioner appealed his conviction and sentence to the Alabama Court of Criminal Appeals. On March 16, 1990, the Alabama Court of Criminal Appeals affirmed the guilty verdict and sentence rendered by the Trial Court, and on April 27, 1990, overruled Petitioner's application for a rehearing. On May 11, 1990, Petitioner filed a petition in the Supreme Court of Alabama for a writ of certiorari to issue to review the decision of the Alabama Court of Criminal Appeals. On August 31, 1990, the Supreme Court of Alabama denied

Petitioner's petition for a writ of certiorari. Petitioner is presently out on bond.

REASONS FOR GRANTING THE WRIT

WHEN A DEFENDANT IS A MEMBER OF A COGNIZABLE RACIAL GROUP, THE PROSECUTOR CANNOT USE HIS PEREMPTORY STRIKES TO DISCRIMINANTLY REMOVE MEMBERS OF THAT RACIAL GROUP FROM DEFENDANT'S PETIT JURY, SUCH CONDUCT WOULD VIOLATE THE SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner, Bobby Joe Johnson, is a member of the black race. There were seventeen (17) prospective black jurors on the Petitioner's Jury Venire List. Counsel for the Prosecution used all thirteen (13) of her peremptory challenges to strike thirteen (13) of the prospective black jurors. Counsel for the Petitioner objected to the said Prosecution strikes

and timely motioned the Court to dismiss the jury on the grounds that the strikes were discriminantly made, that the Prosecutor's removal of the black veniremen violated Petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and violated the Petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The Trial Court rejected two (2) of the prosecutor's peremptory strikes and upheld the eleven (11) others. The Prosecutor then peremptorily struck one (1) white juror and one (1) black juror. Counsel for Petitioner objected to the peremptory strike against the black juror, the objection was overruled.

Pursuant to Batson v. Kentucky,
___U.S.____, 106 S.Ct. 1717, 90 L.Ed.2d 69

(1986); Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct., 93 L.Ed.2d 649 (1987), a defendant may establish a prima facie case of purposeful discrimination in the jury selection by proof that he is a member of a cognizable racial group, that the prosecution exercised peremptory strikes to remove members of that group from defendant's petit jury, and that the "relevant circumstances raised an inference that the prosecution used that practice to exclude the veniremen from the petit jury on account of their race." at 106 S.Ct. 1723.

It is uncontroverted that Petitioner is black, a member of a cognizable racial group, and that Counsel for the Prosecution struck twelve (12) blacks from the jury panel. A relevant circumstance to be considered is "the fact...that peremptory challenges...permit []--those

to discriminate who are of a mind to discriminate.--"Batson v. Kentucky, supra; Avery v. Georgia, 345 U.S. 559, 73 S. Ct. 891, 97 L.Ed. 1244 (1953).

Once the defendant makes a prima facie showing, the burden shifts to the prosecution to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption or on his intuitive judgment that they would be partial to the defendant because of their shared race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or affirming his good faith in his individual selections. Accordingly, the prosecutor must articulate a neutral explanation

related to the particular case to be tried. Batson v. Kentucky, supra; Griffith v. Kentucky, supra.

In the case sub judice, the Prosecutor used her peremptory challenges to strike twelve (12) of the seventeen (17) black persons on the venire. The Prosecutor stated that the blacks were struck not because they were black, but were struck for other reasons.

As to the black jurors Joseph Atwood, Willie Austin, Ralph Frazier, Ellis Perkins and Patricia Wilson, the Prosecutor stated that the Wilcox County Sheriff had informed her that the said black jurors had supported the Petitioner in his political race for County Commissioner. However, when questioned, the Wilcox County Sheriff denied having provided the said information to the Prosecutor. The Prosecutor then called

her Assistant Prosecutor, Donald McCleod, as a witness. The Assistant Prosecutor stated he had inside information as a result of being a member of the Democratic Executive Committee that the aforestated said black jurors did in fact support the Petitioner's campaign for County Commissioner. However, the Prosecutor did not question the said black jurors concerning their alleged political support, nor did the Prosecutor question any of the white jurors as to whether they supported the Petitioner in his campaign for County Commissioner. The relevant circumstances raise an inference that the Prosecutor used her peremptory strikes against the said black jurors on account of their race.

As to the black jurors Binnia Coleman and Zack Williams, the Prosecutor stated that the said black jurors knew the

Petitioner. Petitioner was at the time the Chairman of the County Commission for Wilcox County, Alabama, and it is reasonable to assume that every member of the jury venire, including all the white jurors, knew the Petitioner. However, the Prosecutor did not question the said black jurors concerning their alleged acquaintance with the Petitioner, nor did the Prosecutor question any of the white jurors as to their acquaintance with the Petitioner. In reference to Binnia Coleman, the Prosecutor further stated that Ms. Coleman was struck because her husband was disabled and that the Defendant had some obvious disabilities. Though the Prosecutor's disability argument concerning Ms. Coleman is more credible than her other arguments, the proffered reason has no actual relevance to the Petitioner's case. The relevant

circumstances raise an inference that the Prosecutor used her peremptory strikes against the said black jurors on account of their race.

As to the black juror John Gragg, the Prosecutor stated that the Wilcox County Sheriff had informed her that the said black juror had been charged with driving under the influence in the past, and that the said black juror had failed to acknowledge this when the general question to the jury panel was asked as to whether any of them had ever been charged with anything, including a D.U.I. Though the said black juror at one time had been charged with a D.U.I., the charge was later dismissed. The dismissed D.U.I. charge did not relate to the Petitioner's case. The relevant circumstances raise an inference that the Prosecutor used one of her peremptory strikes against the said

black juror on account of his race.

As to the black jurors James McConnico, Larry Saulsberry and Edwin Snow, the Prosecutor stated that each of them had a brother against whom criminal charges were pending, and additionally, Edwin Snow allegedly had a criminal record and allegedly was an alcoholic. The reasons proffered by the Prosecutor for striking the said black jurors had no relevance to the Petitioner's case. The relevant circumstances raise an inference that the Prosecutor used her peremptory strikes against the said black jurors on account of their race.

The Prosecutor's stated reasons for exercising her peremptory challenges against the black prospective jurors are at best an affirmation of her own good faith in her individual selections, which said subjective good faith affirmation

cannot rebut Petitioner's prima facie case of discrimination against the Prosecutor. Batson v. Kentucky, supra; Griffith v. Kentucky, supra; Avery v. Georgia, supra.

The reasons proffered by the Prosecutor for using her peremptory strikes against the said prospective black jurors, were pretextual and served only as a subterfuge for discriminantly striking the said black jurors from the jury venire.

The combination of factors as previously set forth in the impaneling of the petit jury in the case sub judice, raises the necessary inference of purposeful discrimination on the part of Counsel for the Prosecution in using her peremptory challenges. Counsel for the Prosecution cannot rebut the Petitioner's case merely by denying that she had a discriminatory motive or affirming her

good faith in her selections. Batson v. Kentucky, supra; Griffith v. Kentucky, supra. Counsel for the Prosecution failed to rebut Petitioner's prima facie case of purposeful discrimination asserted against her in using her peremptory challenges to strike twelve prospective black jurors from Petitioner's petit jury.

While Petitioner acknowledges that a defendant has no right to a petit jury composed in whole or in part of persons of his own race, the equal Protection Clause guarantees a defendant that the Government will not exclude members of his race from the venire on account of his race. U.S. v. Dennis, 804 F. 2d 1208 (11th Cir. 1986), cert. den. ___U.S.___, 107 S.Ct. 1973 (1987); Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed 664 (1880).

Considering the foregoing, coupled with the undisputed fact that peremptory

challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate, the substantial weight of evidence strongly infers that the Prosecution purposefully used its peremptory strikes in a discriminatory manner to exclude the twelve black jurors in question from the Petitioner's jury.

CONCLUSION

Considering the foregoing, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,



LARRY C. MOORER

Attorney for Petitioner
First National Bank Building
107 St. Francis Street
Suite 2408
Mobile, AL 36602
(205) 432-0002

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

=====

BOBBY JOE JOHNSON,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

=====


PROOF OF SERVICE

STATE OF ALABAMA

COUNTY OF MOBILE

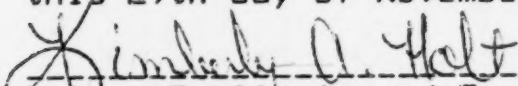
LARRY C. MOORER, after being duly sworn, deposes and says that pursuant to Rule 28.4 (a) of this Court he served on behalf of the Petitioner, Bobby Joe Johnson, the within PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT on counsel for the Respondent, the Honorable Alabama Attorney General Don Siegelman, Office of the Attorney General, Alabama

State House, 11 South Union Street,
Montgomery, AL 36130, upon the Solicitor
General of the United States, Department
of Justice, Washington, D.C. 20530 and
upon the Dallas County, Alabama Deputy
District Attorney's Office, 4th Judicial
Circuit, Selma, Alabama 36701, by U.S.
Mail, postage prepaid.



LARRY C. MOORER
Attorney for Petitioner
First National Bank Building
107 St. Francis Street
Suite 2408
Mobile, AL 36602
(205) 432-0002

Subscribed and Sworn to Before Me
this 29th day of November, 1990.



Notary Public in and For Said
County and State

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

=====

BOBBY JOE JOHNSON,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

=====

PROOF OF MAILING

STATE OF ALABAMA

COUNTY OF MOBILE

LARRY C. MOORER, a member of the Bar
of the United States Supreme Court, after
being duly sworn, deposes and says that he
is the attorney for Petitioner in the
above referenced action, and that he
mailed the within PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF ALABAMA
to the Clerk of the United States Supreme
Court by first class mail, postage

prepaid, this 29th day of November, 1990,
addressed: Clerk of the Court United

States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

LARRY C. MOORER
Attorney for Petitioner
First National Bank Building
107 St. Francis Street
Suite 240B
Mobile, AL 36602
(205) 432-0002

Subscribed and Sworn to Before Me
this 29th day of November, 1990.

Kimberly A. Holt

Notary Public in and For Said
County and State

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

August 31, 1990

B9-1378

Ex parte Bobby Joe Johnson

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: Bobby Joe Johnson v. State)

(CRC 2/746 (Wilcox CC-88-63))

ORDER

The above cause having been duly
submitted, IT IS CONSIDERED AND ORDERED
that the petition for writ of certiorari
is denied.

COSTS TAXED TO PETITIONER.

JONES, J. - Hornsby, CJ., Shores, Houston
and Kennedy, JJ., concur.

APPENDIX "A"

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

SAM TAYLOR	Clerk's Office
Presiding Judge	(205) 242-4590
JOHN C. TYSON, III	
WILLIAM M. BOWEN, JR.	
JOHN PATTERSON	
H. WARD McMILLAN	
Judges	

2nd Div. 746 Wilcox Circuit Court
No. 88-63

BOBBY JOE JOHNSON	VS.	STATE OF ALABAMA
Appellant		Appellee

Dear Sir or Madam:

You are hereby notified that on April 27, 1990, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama: Application for rehearing overruled. No opinion. Judgment not final, see Rules 39 and 41, A.R.A.P.

APPENDIX "B"

BARBARA LINDSEY-----
ASSISTANT CLERK
COURT OF CRIMINAL APPEALS

Hon. William Pompey
117 1/2 Broad Street
P.O. Box 189
Camden, AL 36726

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

JUDICIAL BUILDING, 445 DEXTER AVENUE

MONTGOMERY 36130

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 242-4590

2nd Div. 746

Wilcox Circuit Court
No. 88-63

BOBBY JOE JOHNSON
Appellant

VS. STATE OF ALABAMA
Appellee

Dear Sir or Madam:

You are hereby notified that on March 16, 1990, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:
Affirmed on appeal. No opinion. The judgment of the circuit court is affirmed because the issue raised by the appellant

APPENDIX "C"

concerning Batson v. Kentucky, 476 U.S. 79
(1986), is without merit. Judgment not
final, see Rules 40 and 41, A.R.A.P.

MOLLIE JORDAN-----
CLERK
COURT OF CRIMINAL APPEALS OF ALABAMA

Hon. William Pompey
117 1/2 Broad Street
P.O. Box 189
Camden, AL 36726

Judge Harold Crow